LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 21 1973
MICHAEL RODAK, JR., CLERK

No. 73-614

In the Supreme Court of the United States

OCTOBER TERM, 1973

CAMERARTS PUBLISHING CO., INC., an Illinois Corporation, ALLIED NEWS CO., INC., an Illinois Corporation, FRANK SORREN and ROBERT SORREN,

Petitioners,

VS.

RICHARD S. PRATHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHEN C. SHAMBERG
SHELDON KARON
208 So. LaSalle Street
Chicago, Illinois 60604
Attorneys for Respondent, Richard S. Prather.

Of Counsel:
FRIEDMAN & KOVEN
208 So. LaSalle St.
Chicago, Illinois 60604

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Reasons for Denying the Writ 1

I. Introduction 1

II. Plaintiff Was Properly Granted Separate Judgments Against the Several Defendants Based on Their Separate Acts of Infringement 2

III. Defendants Did Not Meet Their Burden of Proving that the Statute of Limitations Was Applicable 6

IV. Infringement Was Clear, and Defendants Failed to Prove a Reasonable Standard for Apportioning Profits or Damages 9

A. The Quality and Quantity of the Infringement 12

1. The Physical Bulk of the Copying 12

2. The Importance of the Materials Stolen 15

(a) Covers and Publisher's Blurbs 15

(b) Plagiarism of First Lines, First Pages, and Chapter Beginnings and Endings 16

3. The Quality of the Plaintiff's Material that Was Plagiarized 16

B. Defendants' Infringement Was Not De Minimus 17

C. Defendants' Unproven Innocence Is No Defense 18

PAGE

V. Attorney's Fees Were Properly Awarded to Plaintiff 19

VI. Conclusion 20

Appendix (Applicable Statutory Provisions) .....App. 1-2

TABLE OF AUTHORITIES

Cases

Baxter v. Curtis Industries, Inc., 201 F.Supp. 100 (N.D. Ohio 1962) 7

Chappell & Co., Inc. v. Costa, 45 F.Supp. 554 (S.D. N.Y. 1942) 18

Davis v. E.I. DuPont de Nemours & Co., 249 F.Supp. 329 (S.D.N.Y. 1966) 8

Detective Comics, Inc. v. Bruns Publications, Inc., 28 F. Supp. 399 (S.D.N.Y. 1939) 4

Douglas v. Cunningham, 294 U.S. 207 (1935) 18

Freudenthal v. Hebrew Pub. Co., 44 F.Supp. 754 (S.D.N.Y. 1942) 19

F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952) 19

Greenbie v. Noble, 151 F.Supp. 45 (S.D.N.Y. 1957) 3, 6

Gross v. Van Dyk Gravure Co., 230 Fed. 412 (2d Cir. 1916) 3

Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946) 11

H.M. Kolbe Co. v. Shaff, 240 F.Supp. 588 (S.D.N.Y. 1965), *aff'd*, 352 F.2d 285 (2d Cir. 1965) 4

PAGE

Maloney v. Stone, 171 F. Supp. 29 (D. Mass. 1959) 8

McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971) 11

Norman v. Columbia Broadcasting System, Inc., 333 F.Supp. 788 (S.D.N.Y. 1971) 11

Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir. 1962) 10

Sammons v. Larkin, 38 F.Supp. 649 (D. Mass. 1940) 6

Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp., 453 F.2d 552 (2d Cir. 1971) 3

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) 10

Smith v. Little, Brown & Co., 273 F.Supp. 870 (S.D. N.Y. 1967), *aff'd*, 396 F.2d 150 (2d Cir. 1968) 10

Solomon v. RKO Radio Pictures, 44 F.Supp. 780 (S.D. N.Y. 1942) 11

Toksvig v. Bruce Pub. Co., 181 F.2d 664 (7th Cir. 1950) 19

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 9

Statutes

17 U.S.C. § 1(e) 3

17 U.S.C. §101 (1952) 8, 9

17 U.S.C. §115(b) (1952); *as amended* (Supp. 1972) .. 7, 8

17 U.S.C. §116 (1952) 19

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-614

CAMERARTS PUBLISHING CO., INC., an Illinois Corporation, ALLIED NEWS CO., INC., an Illinois Corporation, FRANK SORREN and ROBERT SORREN,

Petitioners,

vs.

RICHARD S. PRATHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The district court found that thirty-three books allegedly written by Jerry M. Goff, Jr. and published and/or sold by the defendants were constructed, to a greater or lesser degree, from sixteen books written by the plaintiff, Richard S. Prather. The only extraordinary element of this case is

that no other court has reported such massive plagiarism where sixteen books written by an author were cannibalized to produce thirty-three books for infringers. In one instance, portions from seven of the plaintiff's books were scattered throughout one of the defendants' books.

In the courts below, this case turned upon various issues relating to the burden of proof. In light of the word-for-word copying engaged in by the defendants, the plaintiff easily satisfied his burden of proving infringement. In their petition, as in the courts below, defendants seek to shift the burden of proving their defenses to the plaintiff. The defendants asserted the statute of limitations, but their evidence did not prove they ceased infringing more than three years prior to the filing of the amended complaint. The defendants contended that not all of the material in their infringing books was stolen from the plaintiff, but failed to prove a reasonable means of apportioning their profits other than to argue that the infringement was *de minimus,* an argument considered and rejected by the courts below.

Defendants have had their day in court, and they have raised no issues in their petition that entitles them to a further review.

II.

PLAINTIFF WAS PROPERLY GRANTED SEPARATE JUDGMENTS AGAINST THE SEVERAL DEFENDANTS BASED ON THEIR SEPARATE ACTS OF INFRINGEMENT.

The district court found that defendant Camerarts Publishing Co., Inc. ("Camerarts"), which published the infringing books under the trade name "Merit Books," and defendant Allied News Service, Inc. ("Allied"), the distributor of the infringing books, were each liable for statu-

tory damages. Judgment in the minimum amount of $250.00 was entered against Allied for each of the seventy-two counts of the complaint, and judgment for statutory damages ranging from $250.00 to $600.00 was entered against Camerarts for each of the seventy-two counts of the complaint.* Defendants argue that this amounted to a double recovery for plaintiff.

In their petition, defendants claim that decisions of the courts below granting separate "in lieu of" recoveries to the plaintiff against the defendants are contrary to all other decisions involving the "in lieu of" clause. The recent authorities cited by defendants do not support this contention. Only one case, which was decided in 1916, supports defendants' position. *Gross* v. *Van Dyk Gravure Co.*, 230 Fed. 412 (2d Cir. 1916).

In *Screen Gems-Columbia Music, Inc.* v. *Metlis & Lebow Corp.*, 453 F.2d 552 (2d Cir. 1971), the plaintiff was not awarded damages based on the "in lieu of" clause, but was awarded the 2¢ per phonograph record statutory royalty granted by 17 U.S.C. §1(e). Thus, the court granted judgment in the amount of the full royalty that the plaintiff could have collected, and the court found that the plaintiff was entitled to no more than this maximum amount from all defendants involved with a single act of infringement, the sale. (At p. 554)

No damages were awarded in *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957). Furthermore, the court's discussion supports plaintiff. The court quotes from a 1922

---

* Defendant Frank Sorren, an officer of Camerarts, and defendant Robert Sorren, an officer of Allied, were each held jointly and severally liable with their respective corporations.

Second Circuit case to the effect that the publisher is an infringer and the vendor is an infringer. Each committed a separate act of infringement. Since the court found that there was no infringement, its discussion of damages was irrelevant; nevertheless, the court stated that it would have assessed damages against the seller in the amount of no more than $250, but would not charge the seller with the *profits* of the printer who was not joined as a party.

Another case cited by defendants is *H. M. Kolbe Co.* v. *Shaff*, 240 F.Supp. 588 (S.D.N.Y. 1965), *aff'd*, 352 F.2d 285 (2d Cir. 1965). This case does not support defendants' argument because the court awarded damages and profits rather than utilizing the "in lieu of" clause. Nevertheless, the case is in agreement with the decisions of the lower courts in the instant case insofar as it involved the question of whether a corporate officer who participated in the infringement was equally liable with his principal, the corporation. The court held that there was one act of infringement and that the officer who participated was liable. In the instant case, the district court adopted the same ruling by holding that defendant Frank Sorren was jointly and severally liable with defendant Camerarts, of which he was an officer, in connection with the publication and sale of the infringing materials. It also held that defendant Robert Sorren and defendant Allied, of which he was an officer, were jointly and severally liable in connection with the sale of the infringing materials.

Not only did the court fail to provide any discussion with regard to its statement in *Detective Comics, Inc.* v. *Bruns Publications, Inc.*, 28 F.Supp. 399 (S.D.N.Y. 1939), it is not clear from the reported decision whether the court awarded actual profits and damages or damages under the

"in lieu of" clause. The court merely says that it awarded the plaintiff's damages and the defendant's profits. (At p. 401)

The decisions of the courts below granting separate damages are reasonable and consistent with the plain language of statute.

On page 9 of the petition, defendants quote the following from the court of appeals:

> "We find nothing 'inpermissible' about holding both consignor and consignee liable for copyrighting infringement."

Defendants fail to provide this court with the proceeding language, which was the following:

> "Prescinding semantics, we need merely note that it would be manifestly improper to permit recovery of profits, where they are proved, against only one of the entities in the chain of distribution." (A.3(a))

In the courts below, the plaintiff argued vigorously that he was entitled to recover the profits of both the publisher and the distributor. Based upon the evidence before them, both courts below rejected this argument and approved the use of the "in lieu of" clause. Had such profits been awarded, plaintiff would have been entitled to the individual profits of each infringer. Both the publisher and the distributor infringed the plaintiff's federally protected copyrights, and there is no reason why plaintiff was not entitled to be awarded separate "in lieu of" damages against *each* infringer.

Probably because the results reached below were so reasonable, there has been very little discussion of this issue in the cases. There are several cases in which the courts consider whether one infringer should be liable for the

profits of the other. In *Sammons* v. *Larkin,* 38 F. Supp. 649 (D.Mass 1940), the court held that one infringer was not liable for the profits of the other infringer. (At. p. 655) The court then awarded the plaintiff the profits of one of the defendants and granted the minimum statutory damage of $250 against the other defendant, which had no profits. In *Greenbie* v. *Noble, supra,* the court conjectured that it would have assessed statutory damages against the seller of the infringing materials but would not charge the seller with the profits of the printer.

III.

DEFENDANTS DID NOT MEET THEIR BURDEN OF PROVING THAT THE STATUTE OF LIMITATIONS WAS APPLICABLE.

The applicability of the statute of limitations to the plaintiff's claims was a question of evidence decided adversely to the defendants by the courts below. In their petition, the defendants attempt to make up in argument what they failed to prove to the courts below.

In their recitation of the facts, the defendants misstate the evidence. The circuit court (A.1a) and the district court (A.11a) both noted that the parties agreed that at least one copy of each infringing book, with two exceptions, was published, sold and distributed by defendants within three years of the time when the instant case was commenced. In fact, the district court found:

> "[T]hat Allied and Camerarts were receiving returns and otherwise dealing with most of the books well into the limitations period." (A.11a-12a)

Defendants also complain that there was no support for the findings of the courts below that the infringing books were sold on consignment. Here again, defendants ask this court to disregard the stipulation of the parties that the books were sold on consignment.

In their petition, as below, defendants attempt to make the argument that the statute of limitations commenced from the first act of infringement. Defendants failed to cite the case upon which the district court relied, which is the only reported decision dealing specifically with the application of the 17 U.S.C. §115(b), a section that was added by amendment in 1957. This case is *Baxter* v. *Curtis Industries, Inc.,* 201 F.Supp. 100 (N.D. Ohio 1962). In this case, the court held that the statute of limitations contained in 17 U.S.C. §115(b) did not begin to run until the *last* act of infringement. The court explained the reasons behind the enactment of 17 U.S.C. §115(b) as follows:

> "Based on the foregoing, it appears that prior to the 1957 Amendment of Sec. 115(b) the rule as to copyright infringement actions was, that the period of limitation began from the date of the last infringing act.
>
> "It is the opinion of the Court that the amendment was not intended to, and did not, change this basic concept. It simply made uniform a three-year limitation dating from the last act of infringement, in place of the multitude of state limitation periods. It is a remedial measure and should operate as such.
>
> "The complaint alleged a continuous infringement from February 1958 to the date of the complaint. There is no denial of this allegation by the defendant, and it must be presumed true for the purposes of this motion." 201 F.Supp. 100, 101

The essential question is whether copyright infringement should be viewed as a whole, continuous act or whether the sale of each infringing book is to be considered, in and of itself, a copyright violation. The statutory scheme of compensating a plaintiff that is set forth in 17 U.S.C. §101 provides, as an alternative remedy, minimum and maximum awards for copyright infringment. It is obvious that §101 contemplates copyright infringement as a unitary act; otherwise, each book published, distributed or sold by a defendant within the three year period could be a separate act of infringement to which the minimum statutory damage of $250.00 would be applicable. Thus, the publication, distribution, or sale by the defendants of 20 copies of each book could result in a recovery by plaintiff of $5,000, and the publication, distribution or sale of 100 books could result in the minimum statutory damages of $25,000. It has been held that multiple reproductions of the same infringing article constitute one claim for damages under 17 U.S.C. §101. See *Davis* v. *E.I. Du Pont De Nemours & Co.,* 249 F.Supp. 329, 322-343 (S.D. N.Y. 1966).

The only reasonable conclusion is the one adopted by the district court: that the limitations' period in 17 U.S.C. §115(b) does not commence to run until the last act of infringement that continues over a span of time.

Maloney v. *Stone,* 171 F.Supp. 29 (D.Mass. 1959), cited by defendants on page 13 of the petition, is not in point. In this case, the court held that a printer had ceased to infringe more than two years before the suit was brought. Unlike the instant situation, where Camerarts retained title to the books which were sold by it on consignment, the printer had terminated all manufacturing, had turned over all plates and materials and had terminated the contract. 171 F.Supp. 29,31.

Finally, defendants cite an antitrust case, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), in connection with their defense. (Petition, p. 13) The statute applicable to a continuing conspiracy under the antitrust law does not apply to an action for copyright infringement. The nature of §101 of the Copyright Statute cuts against defendants' argument. Earlier in this brief the plaintiff discussed why copyright infringement must be treated as a continuous act and not broken up as suggested by the defendants; to do so would make each sale a separate cause of action for which the plaintiff is entitled to the $250 minimum statutory award. Applying this same reasoning to *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* each sale of a book by the defendants would constitute a separate claim, and, as to each sale, the plaintiff would be entitled to the $250 minimum.

Neither the evidence nor the law sustains defendants' position that they ceased their infringing activities within three years of the filing of the Amended Complaint.

IV.

INFRINGEMENT WAS CLEAR, AND DEFENDANTS FAILED TO PROVE A REASONABLE STANDARD FOR APPORTIONING PROFITS OR DAMAGES.

As with the statute of limitations defense, defendants seek to elevate their failure of proof in the courts below to matters that will "throw needless confusion into the field of copyright, and subject these defendants to unsupportable injustice." (Petition, p. 23) Defendants fail to point out to this court that they were engaged in the most widespread instance of multiple copyright infringement that has ever been reported. Defendants seek to ignore that thirty-three books they published, sold and distributed infringed sixteen of the plaintiff's copyrights.

The district court found that the Merit Books in issue "contained word-for-word copying from books written by Prather." (A. 6a) The district court also found as follows:

> "The copying, where shown, consists of flagrant word for word verbatim copying and is substantial in both volume and the significance of the portions taken." (A. 6a)

It is plaintiff's position, well supported by law, that once infringement was proven as to parts of a book published and sold by the defendants, the burden of proving a reasonable means of apportionment, if there can be one, is on the defendants. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406 (1940); *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120-21 (2d Cir. 1962); *Smith* v. *Little, Brown & Co.*, 273 F.Supp. 870, 874 (S.D.NY. 1967), *aff'd*, 396 F.2d 150 (2d Cir. 1968). Instead of meeting their burden by suggesting to the courts below a method of apportionment for each of their infringing books, the defendants asked the courts to eliminate in their entirety any claim for infringement based upon thirty-nine examples of plagiarism shown in thirty-nine counts of the complaint.

In essence, defendants' argument is that, because many of the books that they published were cannibalized from a number of books written by the plaintiff, instead of just one, they should not be liable for any copyright infringement. There is no reason why defendants should be in a better position because their books copied a few pages from a number of the plaintiff's books rather than all from one of plaintiff's books. By defendants' theory, they could publish a novel of 100 pages containing two pages from each of 50 of the plaintiff's books and not be liable for copyright infringement. This would be an absurd result.

Defendants cite certain cases in an attempt to bolster their position that stealing just a little bit is not copyright infringement. If the court were dealing with one paragraph from one of the plaintiff's books and one paragraph from one of the defendants' books, perhaps the defendants would have an argument; however, this is not the case. As the plaintiff has pointed out, many of the Merit Books involved contain word-for-word copying from a number of the plaintiff's books. Copying, if proven, is copying, whether it is a little bit or a lot. After the plaintiff establishes that one of the defendants' books had been constructed, in whole or in part, from one or more of his books, he is entitled to all or part of the defendants' profits.

Most of the cases cited by the defendants on page 15 of their petition miss the point. The defendants key on the words "material" or "substantial" copying. The question before most of the courts was whether there was sufficient *similarity* between the alleged infringing work and the plaintiff's work so that infringement could be found. One test of infringement is similarity, but another test of infringement is *identical, word-for-word* copying. In the instant case, we are considering, for the most part, word-for-word copying. In *Heim* v. *Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946), and *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F.Supp. 415 (S.D.N.Y. 1971), the courts found no copying whatsoever. In *Solomon* v. *RKO Radio Pictures*, 44 F.Supp. 780 (S.D.N.Y. 1942), and *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F.Supp. 788 (S.D.N.Y. 1971), the courts found that there was only a similarity. Other cases cited by the defendants involve copying photographs from catalogs, which is hardly a fair test to apply to word-for-word copying of the plaintiff's fiction. A quote from Nimmer on Copyright, which appears on pages 15 to 16 of defendants' petition, is also inapposite because the

instant case does not concern "the quantum of fragmented literal similarity," but it deals with substantial literal identity.

A. The Quality and Quantity of the Infringement

There are a number of ways in which the quality and quantity of the infringement by the defendants from the plaintiff's books can be viewed. These will be discussed below, with examples.

1. The Physical Bulk of the Copying

The Appendix to the district court's opinion shows the sources for each Merit Book that has materials taken from the plaintiff's books. The number of pages of the infringing books on which copying appears does not do justice to the extent of copying. For example, direct copying appears on thirty-four pages of *Thrill Crazy* and its reprint, *Liza,* which is a 140 page book. However, this copying is spread throughout *Thrill Crazy* and *Lisa* and constitutes the major material in the book, the rest of which is more or less filler. When *Thrill Crazy* and *Lisa* are broken down, the following appears:

Thrill Crazy & Lisa	Prather, Book and Pages	
13-14	*Strip For Murder*	55-56
15-18	" " "	127-130
20	" " "	130
21-24	" " "	57-59
32	*Three's A Shroud*	47-48
34	*Way Of A Wanton*	5
34-42	" " "	43-51
105-110	" " "	86-89
118-119	*Three's A Shroud*	157, 87
120-121	*Way Of A Wanton*	57
137-138	*Three's A Shroud*	152-153
139	" " "	65

The plaintiff can conceive of no way in which the defendants could undo the commingling of passages from the plaintiff's books that make up *Thrill Cray* and *Lisa.*

Another example of the piecing together done by the author of the infringing books is *Irresistibly Seductive Female.* Thirteen of the sixteen chapters in *Irresistibly Seductive Female* contain word-for-word copying. A chapter by chapter analysis of *Irresistibly Seductive Female* shows the following word-for-word copying:

Irresistibly Seductive Female	Prather, Book and Pages	
Ch. 1		
Editor's blurb for chapter	*Shell Scott's Seven Slaughters*	65
7	" " " "	64-65
Ch. 2		
20-21	" " " "	11
Ch. 3		
31	*Three's A Shroud*	59
Ch. 4		
42-43	*Everybody Had A Gun*	27
43	" " "	30
43	" " "	64
43	" " "	88
Ch. 5		
Editor's blurb for chapter	" " "	93
49	*Shell Scott's Seven Slaughters*	67-68
49-52	*Three's A Shroud*	63-65
52-53	*Everybody Had A Gun*	91-93
53-58	*Shell Scott's Seven Slaughters*	59-62

Ch. 6		
Editor's blurb		
for chapter	*Shell Scott's Seven Slaughters*	77
60-61	" " " "	76-77
Ch. 7		
68-74	" " " "	21-25
75-77	*Dance With The Dead*	193-196
Ch. 8		
78-80	*Dance With The Dead*	114-116
80-81	" " "	83
Ch. 9		
86	*Dance With The Dead*	137
87-88	*Everybody Had A Gun*	78
89	*Kill The Clown*	70
89-90	" " "	137
Ch. 10		
-	-	-
Ch. 11		
108-113	*Everybody Had A Gun*	33-35
Ch. 12		
115-117	*Bodies In Bedlam*	110-112
Ch. 13		
-	-	-
Ch. 14		
132-135	*Everybody Had A Gun*	133-135
Ch. 15		
145	*The Scrambled Yeggs*	23
Ch. 16		
-	-	-

When the plagiarizer scatters stolen material from seven of the plaintiff's books throughout the infringing book, there can be no reasonable method of apportionment. Without the materials stolen from the plaintiff's books, which

comprise fight scenes, sex scenes, and clever descriptions, there would have been no *Irresistibly Seductive Female.*

Other examples are *Passion Cult* and its reprint, *Seductive Nymph.* These appear to contain 160 pages; however, there is a blank page at the end of each chapter, which reduces the number of printed pages by seventeen. Twelve of the seventeen chapters in *Passion Cult* and *Seductive Nymph* contain copying from two books by the plaintiff, *Always Leave 'Em Dying* and *Strip for Murder.* One of the major plot lines of the books, hiring a detective to work in a nudist camp, was stolen directly from the plaintiff's book entitled *Strip for Murder.*

2. The Importance of the Materials Stolen

One gauge of the plagiarized material's importance can be found by noting the significance of the stolen material to the plaintiff's books or the importance of where the stolen material was placed in the Merit Books. For this reason, the district court considered the covers of books, publisher's blurbs, the first lines of the books, and the beginnings and endings of chapters. (A. 6a)

(a) Covers and Publisher's Blurbs

Camerarts thought highly enough of the language stolen from the plaintiff to feature it in the blurbs appearing on the cover of Merit Books or on the first page inside the front cover. Camerarts used Prather's materials in the blurbs for five infringing books.

Another measure of the importance of the material taken by the defendants is the language that the plaintiff's editors thought worthy of being placed on the cover or on the first page inside the front of its books. The record shows twelve such instances.

(b) Plagiarism of First Lines, First Pages, and Chapter Beginnings and Endings

In any work of fiction, especially one designed for mass market distribution as were the Merit Books, the most important lines in the book are the lines on the first page. Also important are the words and paragraphs at the beginnings and ends of the individual chapters in the books. An analysis on this basis shows that the plagiarized words not only played an important part in the defendants' books, but they were also important to the plaintiff's books.

First lines of the first chapters of three infringing books were derived from the plaintiff's works.

In six instances the defendants' books utilized the first pages of the first chapters of books written by the plaintiff.

In many of the defendants' books, the chapters were preceded by blurbs. In four instances these blurbs contained materials taken from the plaintiff.

3. The Quality of the Plaintiff's Material That Was Plagiarized

It is difficult for the defendants to argue that the plaintiff's writing was not good because they published so much of it and even repeated many of the same scenes in book after book. There are certain passages from the plaintiff's books that were repeated so often by the defendants that they must have great worth. For example, the following passage appears on pages 78-79 of the plaintiff's book entitled *Strip For Murder:*

> "She had raised up on one elbow to press her fingers against my mouth, and now she still held herself partly off the bed. Light from the front room, seeming brighter now, cast a silvery mistiness over her bare shoulders, and over proud breasts that looked smoother than ivory, soften than down.

> "She was looking at my face, her long-lashed eyes almost closed, lips parted. 'You won't be alone,' I said. I leaned closer to her and she tilted her head slightly, and I saw the tip of her tongue flick against her lips just before they parted even more. Then they were against my mouth. At first her lips were softer than the whispering wind outside the cabin, but then they writhed and curled against mine, and her tongue flicked against them again as we both moved closer together and our arms went around each other.
>
> "Her lips clung to mine for a long time, her hands against my back, fingers curling, then her lips went slack and her head rolled to one side. I kissed her throat, the curve of her shoulder, the soft warmness of her breasts, and she breathed rapidly, making small sounds deep in her throat. Then I felt her move against me, her lips traced my cheek and touched my ear as she whispered to me.
>
> "I got up. When I slid into bed beside her again, barely touching her, she was lying motionless on her back. For long seconds she lay that way, unmoving. Then slowly she turned toward me, pressed her lovely soft body deliberately against me."

This passage, more or less and word for word, was used by the defendants in *seven* infringing books.

In all, there are twelve instances of the multiple use in a number of Merit Books of the same, or parts of the same, passage from the plaintiff's books.

B. Defendants' Infringement Was Not De Minimus

On page 17 of their petition, defendants criticized the courts below, stating that they:

> "[F]ailed to make any analysis whatsoever of the alleged infringing language set forth in the Amended Complaint and the exhibits thereto."

The Appendix to the district court's opinion should put to rest any contention that it did not consider carefully

each instance where it found an infringment. In this Appendix, the court set forth specific pages of Merit Books on which infringing material appears opposite references to specific pages in plaintiff's books from which the material was taken. With a few exceptions, defendants have not undertaken to show this court, nor did they show the courts below, that the thirty-nine counts of the complaint listed on pages 4 and 5 of their petition are so insignificant that they should be treated as *de minimus.* As is pointed out above, some of the passages written by the plaintiff were so memorable that they appeared in seven separate Merit Books, and the texts of five Merit Books utilized Prather's materials in publisher's blurbs and on the covers.

The plaintiff will certainly admit that the plagiarism listed in some counts of the complaint is not as massive as that listed in others, but it was the defendants' job to point this out to the district court rather than merely to dismiss a count by saying that it was only two or three pages from the plaintiff's book.

C. Defendants' Unproven Innocence Is No Defense

In an obvious attempt to gain the sympathy of this court, the defendants have argued their innocence and good faith as mitigating factors on pages 3, 11, 14, 22 and 24 of their petition. To the extent that lack of intent can be a mitigating factor, the defendants have not proven it, and there are facts in the record which show that defendants Camerarts and Frank Sorren knew or should have known that Goff was copying from someone else's work.

All of the courts considering the so-called "innocent infringer" argument have held that a copyright infringer's lack of knowledge or good faith is immaterial to the infringer's liability. *See, e.g., Chappell & Co., Inc.* v. *Costa,* 45 F.Supp. 554 (S.D.N.Y. 1942). *See, Douglas* v. *Cunningham,* 294 U.S. 207 (1935) (upholding a district court judg-

ment of $5,000 and attorneys' fees against a defendant having no knowledge of the copyrighted materials); *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) (upholding the imposition of the maximum amount of discretionary damages, $5,000, against a defendant which unknowingly infringed); *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950) ("intention is immaterial if infringement appears." at 666); *Freudenthal* v. *Hebrew Pub. Co.*, 44 F.Supp. 754 (S.D.N.Y. 1942) (holding: "Even if defendants did not knowingly copy plaintiff's composition, that would be no defense." at 755).

V.

ATTORNEY'S FEES WERE PROPERLY AWARDED TO PLAINTIFF

Defendants contend that the district court should not have granted the minimal amount of $4,000 to the plaintiff for his attorney's fees. None of the cases cited by the defendants are factually comparable with the instant case. Additionally, in several of those cases the courts found that there was no infringement.

The trial court clearly had the discretion to award the plaintiff "a reasonable attorney's fee as part of the costs." 17 U.S.C. §116. The plaintiff was entitled to attorney's fees in this case because of the complex nature of the infringements and the great number of infringements. Although the attorneys for both plaintiff and defendants cooperated to make use of the district court's pre-trial procedures to simplify the issues and to reduce trial time, many hours were required to be spent. The plaintiff could have saved a great amount of attorney's fees if the defendants had stipulated to infringement, which was very clear. Additionally, the defendants introduced no evidence to support the positions that they had taken regarding certain contested issues of law and fact, including: (a) the

number of copies of each Merit Book title that were printed but not distributed and sold, (b) the direct expenses of the defendants attributable to those copies of each infringing Merit Book that were sold, with the exception of printing expenses, (c) the indirect expenses of the defendants attributable to those copies of each infringing Merit Book that were sold, (d) whether the plaintiff was estopped from claiming damages because of laches, and (e) that the defendants lacked knowledge of the infringements.

VI.

CONCLUSION

The only points raised in defendants' petition deal with instances where defendants (a) failed to meet their burden of proof and (b) disagree with the exercise of the district court's discretion. These do not present adequate reasons why the decisions of the courts below require the issuance of a Writ of Certiorari.

Wherefore, respondent prays that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

STEPHEN C. SHAMBERG and
SHELDON KARON
208 South LaSalle Street
Chicago, Illinois 60604
346-8500
Attorneys for Respondent,
Richard S. Prather

Of Counsel:
FRIEDMAN & KOVEN
208 South LaSalle Street
Chicago, Illinois 60604
346-8500

Dated: November 23, 1973

APPENDIX

APPENDIX

APPENDIX

Applicable Statutory Provisions

17 U.S.C. § 1(a) (1952):

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;

17 U.S.C. § 101 (1952):

> If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> • • •
>
> (b) *Damages and profits; amount; other remedies.*
>
> —To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.
>
> • • •

17 U.S.C. § 115(b) (1952); *as amended* (Supp. 1972):

> No civil action shall be maintained under the provisions of this title unless the same is commenced within three years after the claim accrued.

17 U.S.C. § 116 (1952):

> In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.